No. 96-1367

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

TAYLOR EQUIPMENT, INC., DOING BUSINESS AS MIDCON EQUIPMENT COMPANY,

Petitioner,

vs.

JOHN DEERE COMPANY; JOHN DEERE INDUSTRIAL EQUIPMENT COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly predicted in this diversity jurisdiction case, that under South Dakota contract law, when a written dealer agreement provides that it may not be assigned without written consent of the manufacturer, and the manufacturer acts honestly in deciding whether to approve an assignment of the agreement, the manufacturer is not required by an implied covenant of good faith and fair dealing to also act reasonably.

LIST OF INTERESTED PERSONS

Petitioner is Taylor Equipment, Inc., d/b/a Midcon Equipment Company. Its shareholders are Paul Taylor and Cecilia Taylor.

Respondents are Deere & Company, a publicly-held corporation incorporated under the laws of the State of Delaware, and John Deere Industrial Equipment Company, a wholly owned subsidiary of Deere & Company, also incorporated in Delaware. Neither Deere & Company nor John Deere Industrial Equipment Company have parent companies, subsidiaries, or affiliates which have issued shares to the public in the United States of America.

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Respondents Deere & Company and John Deere Industrial Equipment Company (Deere) respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered on October 18, 1996.

OPINION BELOW

The opinion of the Court of Appeals is included in the appendix to the Petition for Writ of Certiorari (Petition) and has been published as *Taylor Equipment, Inc. d/b/a Midcon Equipment Company v. John Deere Company and John Deere Industrial Equipment Company*, 98 F.3d 1028 (8th Cir. 1996).

STATEMENT OF THE CASE

A. The Nature of the Case

Deere distributes industrial equipment it manufactures to independent dealers who finance purchase of the equipment through floor plan financing provided by Deere. Plaintiff Taylor Equipment, Inc. d/b/a Midcon Equipment Company (Midcon) was a Deere dealer in South Dakota and Iowa pursuant to written agreements that provided Midcon could not assign the agreements "without the prior written consent of [Deere]."

Upon discovering Midcon $370,000 out of trust on its floor plan financing agreement, Deere informed Midcon its breach of the financing agreement was cause for terminating the dealer agreements, but as an alternative to terminating the agreements Deere would allow Midcon to remain a dealer for up to eighteen months while Midcon attempted to find a buyer for the business. Deere would not approve Midcon's first prospective assignee of the dealer agreement (Interstate) unless Interstate corrected deficiencies in its financial strength with additional equity capital.

When Interstate refused, Deere did not approve the assignment and the sale to Interstate was not completed. After a later assignment of the agreements was approved by Deere, Midcon sued Deere for not approving assignment to Interstate, asserting that Deere's failure to do so constituted a breach of a covenant of good faith and fair dealing under South Dakota contract law.

The District Court bifurcated Deere's counterclaim that Midcon had obtained discounts from Deere to which it was not entitled. It refused to admit Deere's evidence that Midcon was out of trust and that Deere had permitted Midcon time to sell its business rather than terminating the dealer agreements immediately. It also refused to admit Deere's evidence of Interstate's subsequent financial troubles that substantiated Deere's concern about Interstate's financial strength that was the reason Deere refused to approve assignment of the dealer agreements to Interstate. The District Court instructed the jury that South Dakota law required Deere "to act fairly and reasonably." The jury returned a verdict against Deere.

B. The Court of Appeals' Decision

Applying the South Dakota common law of contracts in this diversity jurisdiction case, the Court of Appeals held that "[w]ere the Supreme Court of South Dakota to apply the holdings in these cases to this fact setting, it is clear that Midcon's implied covenant claim would fail as a matter of law." (Petition 10a). The cases to which the Court of Appeals referred were South Dakota cases applying an implied covenant of good faith and fair dealing, and cases from other jurisdictions in dealer termination and assignment of dealer agreement contexts. (Petition 7a-10a). These cases hold in pertinent respect that an implied covenant may not limit a clear contractual provision permitting a manufacturer to terminate a dealer agreement or permitting a manufacturer to refuse to approve assignment of a

dealer agreement. The Court of Appeals explained that absent contractual limitations, or Midcon's justified expectations otherwise, Deere had an unrestricted right to not approve assignment of Midcon's contract rights to Interstate. (Petition 10a-11a).

The Court of Appeals also held that even if the implied covenant applied, it did not impose a duty to "be reasonable", but imposed liability only if Deere acted dishonestly. (Petition 11a-13a). This it stated was consistent with the adoption by the South Dakota Supreme Court of the "honesty in fact" standard in South Dakota's enactment of the Uniform Commercial Code (UCC). (Petition 13a). The Court of Appeals then held that even under that standard the judgment on the jury verdict must be reversed "because Midcon presented no evidence that Deere acted dishonestly when it disapproved the proposed assignment to Interstate." (Petition 14a).

Thus, the Court of Appeals decision to reverse the judgment against Deere rests on alternative grounds: the dealer agreement gave Deere the right to select its dealers by granting it the unrestricted right to disapprove the assignment of Midcon's dealer agreements, and even if that right was restricted by an implied covenant of good faith and fair dealing, that covenant required only that Deere act with "honesty in fact", and did not require that it act reasonably. The Petition does not address or seek review of this alternative ground for the Court of Appeals decision.

The Court of Appeals also stated that if it had not reversed the judgment as a matter of South Dakota contract law, it would have remanded for new trial because of the improper exclusion of the evidence that Deere caught Midcon out of trust and the evidence of Deere's response, which foreclosed Deere from putting its own action in context when "honesty in fact" was an

issue, and because of the improper exclusion of the evidence of Interstate's later financial troubles which substantiated Deere's concerns about assignment of the dealer agreements to Interstate. The Court of Appeals said "[t]hese evidentiary rulings left Deere to defend a claim of bad faith with one hand tied behind its back." (Petition 5a-6a).

The Court of Appeals also found erroneous the District Court's instruction to the jury that the implied covenant required Deere "to act fairly and reasonably", and would have remanded for new trial on that ground as well, if it had not reversed the judgment as a matter of South Dakota law. (Petition 13a). The Petition does not mention or seek review of the Court of Appeals' statements regarding these errors in the admission of evidence or in instructing the jury.

C. Correction of Misstatements in Petition

The most fundamental misstatement in the Petition is the repeated reference to the UCC and the implication that the Court of Appeals decision construes the UCC. The covenant of good faith and fair dealing involved here, and referred to in the South Dakota cases relied upon by the Court of Appeals, is a part of the South Dakota common law of contracts. The only reference by the Court of Appeals to South Dakota's adoption of the UCC is to SDCL § 57A-1-201(19) defining "good faith" as "honesty in fact." Notwithstanding Petitioner's attempts to frame the Question Presented as a conflict among the circuits interpreting the UCC, this case involves the South Dakota common law of contracts concerning which there is no contrary interpretation by any other court of appeals.

Petitioner's reference to UCC § 2-103(1)(b), enacted in South Dakota as SDCL § 57A-2-103(1)(b), as a statute involved, is also misplaced. It is not involved in this case. It is never

referred to by the Court of Appeals or the South Dakota cases cited by the Court of Appeals. It defines "good faith" in the sale of goods by a "merchant." Rather than the sale of goods, this case involves assignment of a dealer agreement.

The Petition frequently refers to the duties or obligations of a *franchisor*. However, there is no franchise relationship involved here. In addition to being based on South Dakota law rather than Colorado law, this case involves a dealer agreement between Deere as a manufacturer and Midcon as an independent dealer who purchased and sold goods manufactured by Deere. This dealer relationship distinguishes this case from *Larese v. Creamland Dairies, Inc.*, 767 F.2d 716 (10th Cir. 1985) which involved a franchise relationship and is the principal case upon which Petitioner relies in asserting a conflict among the circuits exists.

The Petitioner ignores that this diversity jurisdiction case involves the common law of South Dakota, and that the cases upon which Petitioner relies in asserting a conflict among courts of appeals, also diversity jurisdiction cases, involve the common law of Colorado, Virginia, Georgia and New York.

REASONS FOR DENYING THE WRIT

Summary of Reasons for Denying the Writ

Petitioner seeks to invoke this Court's certiorari jurisdiction because (1) the Question Presented is of general public importance; (2) the Court of Appeals decision is purportedly in direct conflict with the decision of the Court of Appeals for the Tenth Circuit interpreting Colorado law in *Larese v. Creamland Dairies,* and is contrary to decisions of the Courts of Appeals for the Second, Sixth and D.C. Circuits interpreting, respectively, the state law of New York, Georgia and Virginia; and (3) the

Court's guidance is needed to establish a consistent and uniform interpretation in the jurisdictions that have adopted the UCC. There is no merit in these reasons for granting the writ.

The Court of Appeals decision is based upon the South Dakota common law of contracts. This is not a matter that should concern this Court. While the decision looks to the South Dakota UCC for a definition of "good faith", the UCC is not the principal basis of the decision. Since the Court of Appeals was properly attempting to predict how the South Dakota Supreme Court would decide the issue, there is no conflict with decisions of other Courts of Appeals attempting to predict how the courts in Colorado and other states would decide cases under their own state law. Finally, even if the UCC were the basis for the Court of Appeals decision, there is no compelling constitutional or other federal reason that the various states should identically interpret the UCC as adopted by them. Even if there were, that should be a matter for the Congress, not this Court. There is no basis upon which this Court should grant the writ in this case.

I.

THE QUESTION PRESENTED IS NOT A MATTER OF GENERAL PUBLIC IMPORTANCE

Petitioner's first reason for granting the writ is that it is allegedly of general public importance whether a franchisor has a duty to act in good faith and in a commercially reasonable manner when a franchisee seeks to transfer the franchise agreement. This reason does not provide the compelling circumstances that should cause this Court to grant certiorari.

The premise of this reason is that a franchisor's duty to act in good faith is derived from the UCC. Petitioner then concludes that the UCC should be interpreted uniformly in all the

jurisdictions that have adopted it. This premise is false and the conclusion is not warranted. The cases relied upon as creating a conflict among courts of appeals are all based upon the common law of contracts of the state in which the matter arose. None of them rely upon the UCC to define the rights of the contracting parties. There is no uniform or model law that defines the duties of contracting parties under the circumstances involved here. The Petition states no compelling reason that the law governing the relationship between such parties should be uniform in all states. To the contrary, each state should be free to develop its own policy and law on such matters, either by statute or by common law. It is noteworthy that in dissenting from the Court of Appeals decision, Judge Gibson stated that if he were "considering adoption of a federal rule with respect to the covenant of good faith [he] would join much of the court's opinion today with substantial enthusiasm." (Petition 18a).

Even if there were reasons for uniformity among the states in such matters, it is more appropriate that the conflicting policies and competing interests be given due consideration by the Congress, than by this Court on certiorari in a case involving the law of a single state.

There is no compelling reason for granting certiorari based upon a purported matter of general public importance.

II.

THERE IS NO CONFLICT AMONG COURTS OF APPEALS ON THE QUESTION PRESENTED

Six of the eight pages of the Petition which address reasons for granting the writ analyze *Larese v. Creamland Dairies* and the three other court of appeals decisions which are allegedly in conflict with the Court of Appeals decision. This entire argument

overlooks or ignores that the courts in all four of those cases and in this case were applying the state law of different states. There is no conflict presented.

This case involves the South Dakota common law of contracts. *Larese* involved the Colorado common law of contracts. The three other cases cited involved the common law of contracts of New York, Georgia, and Virginia, respectively. There is no conflict when the Court of Appeals for the Eighth Circuit interprets South Dakota common law to be inconsistent with other courts of appeals' interpretations of the common law of Colorado, New York, Georgia or Virginia. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 82 L. Ed. 1290, 58 S. Ct. 860 (1938). ("As to questions controlled by state law, however, conflict among the circuits is not of itself a reason for granting certiorari. The conflict may be merely a corollary to a permissible difference of opinion in state courts.")

Even if the laws of these various states are based upon the same provisions of a uniform or model act, that would not be significant. Even though states may adopt similar or even identical model act provisions, the interpretation of state law is the appropriate responsibility of the highest court in each state. Nothing requires that they interpret identical statutes in exactly the same way. This is true even when uniformity may be desirable. One state court may not finally determine the law of another state. One state's interpretation of its own law is not controlling on another state in interpreting the other state's law, even if each are an adoption of the identical provision of a uniform or model act. None of these matters are of concern to this Court, as long as federal law is not implicated.

When questions of state law are presented to federal courts in diversity jurisdiction cases, the federal court must follow the state law. If the state law is not clear, or if the highest state

court has not addressed the issue presented, the federal court must predict how the state court would interpret the law, and apply it in that manner. In attempting to predict how a state court would decide an issue, a federal court may look for guidance to the law of other states, or to the interpretation thereof by other federal courts. However, it is not required to do so and in the end it must predict how the courts of the state in question would interpret its own law. This is true even if the law in issue is a local adoption of a uniform law or model act.

The lower federal district courts and the courts of appeals are better schooled and more able to determine the state law within their respective States. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500, 86 L. Ed. 2d 394, 403, 105 S. Ct. 2794 (1985). This Court should rarely concern itself with resolving conflicts among different federal courts interpreting the law of the states within their respective jurisdictions. A conflict between district courts, or between a district court and the court of appeals in its circuit, should be resolved by the court of appeals in that circuit. Differences among courts of appeals in interpreting the state law of different states does not present a conflict. If the Court of Appeals for the Tenth Circuit and the Court of Appeals for the Eighth Circuit had interpreted the law of South Dakota differently, there may be a conflict, even though it still may not be a conflict worthy of resolution by this Court. But here, since in *Larese* the Tenth Circuit was predicting Colorado law, there is no conflict with the Eighth Circuit's prediction in this case of South Dakota law. The same is true regarding the cases in which the courts of appeals for the Second, Sixth and D.C. Circuits were predicting how similar issues would be decided by courts in New York, Georgia and Virginia.

The Petition refers to Judge Gibson's dissent in the Court of Appeals decision in this case. However, his dissent merely expressed a different opinion in predicting how the South Dakota

Supreme Court would decide the issue. Petitioner filed a motion for rehearing and a suggestion for en banc consideration in the Court of Appeals, both of which were denied. The suggestion for en banc consideration was denied without indication that any member of the court, including Judge Gibson, desired to rehear this question of state law en banc. That there was a dissent, or that the Court of Appeals decision reversed the district court's ruling, are not compelling reasons why this Court should grant certiorari. Many decisions of the courts of appeals are not unanimous, and decisions of district courts are often reversed by courts of appeals. That the federal judges who have considered this case have not all agreed in predicting how the South Dakota Supreme Court would decide the issue does not create a conflict among the circuits or any other compelling reason this Court should grant certiorari.

There are also factual differences in the cases allegedly in conflict with decision of the Court of Appeals that prevent a conflict among the courts of appeals from arising.

Larese, the principal case relied upon by Petitioner to demonstrate a conflict among the courts of appeals, involved a franchise relationship rather than a manufacturer-independent dealer relationship. The Court of Appeals for the Tenth Circuit characterized the franchise relationship as "a special one" that "requires the parties to deal with one another in good faith and in a commercially reasonable manner." 767 F.2d at 717. Here, Midcon was an independent dealer for thirty years, more than long enough to recover its investment in the business. In response to the argument that to impose a duty of reasonableness upon a franchisor's "right 'freely to exercise his own independent discretion as to parties with whom he will deal' " would violate the rule of *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919), the Tenth Circuit noted that it did not find it an excessive infringement of the franchisor's

rights to require that it act reasonably "when the franchiser has decided that it wants out of the relationship." *Id.* at 718. Here, of course, Midcon was not seeking to get out of the relationship. It had been caught out of trust and as an alternative to outright termination of the dealer agreements Deere had granted Midcon time to find a buyer of the business acceptable to Deere as a new dealer.

The Tenth Circuit also defined the issue before it under Colorado law more narrowly than the decision in this case, and more narrowly than the Question Presented in this case. The Tenth Circuit framed the issue (under Colorado law) as:

> whether a franchisor has an absolute right to refuse to consent to the sale of a franchisee's interest to another prospective franchisee.

Id. at 716. Petition at 10. Here, the Eighth Circuit determined that under South Dakota law, the implied covenant of good faith did not apply to a manufacturer considering whether to consent to transfer of a dealer agreement, or alternatively, if it did apply, it required only that the manufacturer act with honesty in fact, and not that it also act reasonably. *Larese* is not a decision in conflict with the Court of Appeals decision in this case.

Tymshare, Inc. v. Covell, 727 F.2d 1145 (D.C. Cir. 1984) is not factually analogous. It involved a retroactive change in an employee's sales quota that reduced his commissions after a successful year. The Court of Appeals (Scalia, Circuit Judge) stated that it was:

> unnecessary to speculate upon the Virginia Supreme Court's acceptance or rejection of the modern doctrine of "obligation to perform in good faith" . . . [which] is simply a

> rechristening of fundamental principles of contract law well established in Virginia and elsewhere.

727 F.2d at 1152. The court found the validity of the challenged action depended upon the parties reasonable understanding of the express right to adjust quotas, and the purpose of the adjustment. *Id.* at 1153-54. This was dependent upon the facts, which were susceptible to more than one interpretation. Consequently, the summary judgment granted to the employee was reversed. *Id.* at 1155. The UCC is not mentioned in the decision. *Tymshare* is not a case in conflict with the Court of Appeals decision in this case.

In *Davis v. Sears Roebuck & Co.*, 873 F.2d 888 (6th Cir. 1989), the Court of Appeals for the Sixth Circuit applied Georgia common law, stating that "Georgia law imposes the same duty in all contracts whether or not governed by the Uniform Commercial Code." 873 F.2d at 894. The court further cited an Eleventh Circuit decision, *Computer Dimensions v. Basic Four,* 747 F.2d 708 (11th Cir. 1984), for the conclusion that "the good faith requirement codified at section 11-1-203 of Georgia's Uniform Commercial Code provides no independent basis for a cause of action." *Id.* The UCC is not implicated in *Davis v. Sears Roebuck & Co.* and there is no conflict with the Court of Appeals decision in this case.

In *Carvel Corp. v. Diversified Management Group, Inc.*, 930 F.2d 228 (2nd Cir. 1991) the Court of Appeals for the Second Circuit applied New York common law regarding the implied covenant of good faith. Neither the UCC nor the version of the UCC adopted in New York were mentioned in *Carvel Corp.* nor in the cases cited therein as setting forth the New York law being applied. Thus, there is no conflict between the Second Circuit's conclusions regarding an implied covenant of good faith under

New York law, and the Eighth Circuit's prediction of South Dakota law in this case.

There is no conflict among the Courts of Appeals that would provide a basis for granting the writ in this case.

III.

NO SEVENTH AMENDMENT ISSUE IS PRESENTED IN THIS CASE

The third purported reason for granting certiorari in this case is stated in the caption at page 15 of the Petition to be that the Court's guidance is necessary to establish a consistent interpretation and uniform application of the UCC among the jurisdictions which have adopted versions of it. The one paragraph argument that follows, however, relates only to an alleged denial of a right to jury trial under the Seventh Amendment. The reason stated in the caption is based upon two major fallacies: that the UCC is the basis of decision in this case and in the cases relied upon as having conflicting interpretations on the issue of law involved, and that there is a compelling need for consistent interpretation and uniform application of the UCC implied covenant of good faith in all jurisdictions in the nation. These fallacies are set forth in the preceding pages in response to the Petitioner's first two reasons for granting certiorari.

The assertion that the issue presented in this case would have resulted in jury trials in diversity jurisdiction cases in federal courts in other circuits, presents no issue under the Seventh Amendment. A party is entitled to a jury trial only upon claims which state a claim upon which relief may be granted under the applicable substantive law of the jurisdiction. A case based upon the same facts may present such a claim in some states but not in others where the substantive law is interpreted differently.

Consequently, that a party may be entitled to a jury trial in one state on facts which would not entitle the party to a jury trial in another state does not raise an issue worthy of consideration by this Court on certiorari.

CONCLUSION

The Petition presents no conflict in decisions among the courts of appeals nor any compelling reason a writ of certiorari should be granted in this case. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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